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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/688,958	10/21/2003	Francois Cottard	06028.0029-00	3313
22852	7590	07/05/2005	EXAMINER	
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413			ELHILO, EISA B	
			ART UNIT	PAPER NUMBER
			1751	

DATE MAILED: 07/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/688,958

Applicant(s)

COTTARD ET AL.

Examiner

Eisa B. Elhilo

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 April 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1 This action is responsive to the amendment filed on April 11, 2005.

2 The rejection of claims 1-48 and 50-59 under the judicially created doctrine of obviousness-type double patenting over claims 50-100 of the copending Application No. 10/470,131, over claims 1-17, 23-48 and 50-56 of the copending Application No. 10/690,696 and over claims 1-17, 27-51 and 53-59 of the copending Application No. 10/688,970, is maintained for the reasons set forth in the previous office action dated 11,09, 2004.

3 The rejection of claim 1 under the judicially created doctrine of obviousness-type double patenting over claim 89 of the US. Patent No. 6,602,303 B2, is maintained for the reasons set forth in the previous office action dated 11,09, 2004.

4 The rejection of claims 1-2, 4-16, 19-20, 24-40, 43-51 and 53-56 under 35 U.S.C. 102(b) as being anticipated by Laurent et al. (US 2002/0046431 A1), is maintained for the reasons set forth in the previous office action dated 11,09, 2004.

5 The rejection of claims 3, 17-18, 21-23, 41-42, 52 and 57-59 under 35 U.S.C. 103(a) as being unpatentable over Laurent et al. (US 2002/0046431 A1), is maintained for the reasons set forth in the previous office action dated 11,09, 2004.

Response to Applicant's Arguments

6 Applicant's arguments filed 4/11/2005 have been fully considered but they are not persuasive.

With respect to the rejection of claims 1,2, 4-16, 19-20, 24-40, 43-51 and 53-56 under 35 U.S.C. 102(b) as being anticipated by Laurent et al. (US' 431 A1), Applicant argues that the claims of the US. Patent No. 6,602,303 B2 do not anticipate the instant claims because the office

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stated that claim 89 of the US. Patent No. 6,602,303 B2 is not identical to the instant claim because it requires a combination comprising at least one compound chosen from oxyalkylenated fatty alcohols and glycerolated fatty alcohol and at least one hydrogenated solvent having a molecular weight of less than 250 to be presented in the composition, while the instant claim 1 does not require the combination of fatty alcohols and the solvent to be presented in the dyeing composition. Further, Applicant argues that picking, choosing and combining various disclosures to arrive at the presently claimed invention is not a proper anticipation under 102 rejections.

The examiner respectfully disagrees with the above arguments because a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegeaal Bros. v. Union Oil Co. of California*, 824 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). ”When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claims is known in the prior art.” *Brown v. 3M*, 265 F.3d 1349, 1351, 60 USPQ2d 1375, 1376 (Fed. Cir. 2001). In this case Laurent et al. (US’ 431 A1) teaches a composition for the oxidation dyeing of keratin fibers comprising at least one oxidation dyes and its sulfate as acid addition salt (see page 10, paragraph, 0266 and page 13, paragraph, 0316) and cationic poly(vinyl lactam) polymers formed from a) monomers of vinyl lactam and monomers of alkyl vinyl lactam monomers chosen from formulae (Ib) and IIb) (see page 6, paragraphs 0155-0166 and page 7, paragraph, 0167-0177) and, thus, Laurent et al. (US’ 431 A1) teaches all the limitations of the instant claims. Therefore, the anticipation is proper and the rejection under 102(b) is maintained.

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With respect to the argument that the anticipation is improper because the claims are not identical, the examiner would like to point out that double patenting rejection is mainly based on the claims of the prior art and whether these claims are identical or differ from the instant claims and the rejection do not depend on the disclosure of the prior art to reject the instant claims and, thus the anticipation rejection is differs from the double patenting rejection. Therefore, the anticipation is proper and the rejection under 102(b) is maintained.

With respect to the rejection of claims 3, 17-18, 21-23, 41-42, 52 and 57-59 under 35 U.S.C. 103(a) as being unpatentable over Laurent et al. (US' 6431 A1), Applicant argues that a prima facie case of obviousness has not been established.

The examiner respectfully disagrees with the above argument because the use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain. "*In re Heck*, 699 F.2d 1331, 1332-33 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Iemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)). Further, a reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including non-preferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir. 1989); *In re Fracalossi*, 681 F. 2d 792, 794 n.1, 215 USPQ 569, 570 n:1 (CCPA 1982); *In re Lamberti*, 545 F. 2d 747, 750, 192 USPQ 278, 280 (CCPA 1976); *In re Boe*, 355 F. 2d 961, 965, 148 USPQ 507, 510 (CCPA 1966). In this case Laurent et al. (US' 431 A1) teaches a dyeing composition comprising oxidation bases their acid addition salts such as sulfates (see page 10, paragraph, 0266 and page 13, paragraph, 0316), wherein at least one oxidation base is presented in the amount of 0.005 to

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12% (see page 13, paragraph, 0312), cationic amphiphilic polymers in the amount of 0.01 to 3% by wt. (see page 21, paragraph, 0464 and page 26, claim 45) and effective amounts of at least one agent conventionally used in the oxidation dyeing such as at least one adjuvant including surfactants (see page 21, paragraph, 0466) and thus, there is a sufficient motivation to one having ordinary skill in the art to be motivated to optimize the dyeing ingredients in the composition in order to get the maximum effective amount. Further, as to the optimization of results, a patent will not be granted based upon the optimization of the result effective variables when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the prima facie case of obviousness, see *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). See also *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

With respect to the argument regarding claim 57-59, the examiner's position is that *Laurent et al.* (US' 431 A1) teaches devices or kits for dyeing hair comprising at least two compartments (see page 27, claim 66) which implies that more than two compartments may be used to hold and maintain the dyeing composition and thus, there is a sufficient motivation to a person of ordinary skill in the art to be motivated to use any number of compartments including those claimed and would expect these devices would be suitable for holding the dyeing ingredients as those claimed in the absence of contrary. Therefore the rejection of the claims under 35 U.S.C. 103(a) is proper and the prima facie case of obviousness has been established.

7 **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

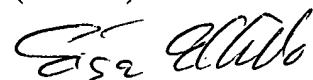
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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eisa B. Elhilo whose telephone number is (571) 272-1315. The examiner can normally be reached on M - F (8:00 -5:30) with alternate Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra Gupta can be reached on (571) 272-1316. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Eisa Elhilo
Patent Examiner
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June 28, 2005

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